

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In re Applications of )  
)  
AMERITECH CORP., )  
Transferor, )  
)  
AND )  
)  
SBC COMMUNICATIONS INC. )  
Transferee, )  
)  
)  
For Consent to Transfer Control of )  
Corporations Holding Commission Licenses and )  
Authorizations Pursuant to Section 214 and )  
310(d) of the Communications Act and )  
Parts 5, 22, 24, 25, 63, 90, 95 and 101 )  
Of the Commission's Rules )

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JUL 26 1999

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

CC Docket No. 98-141

To: The Commission

**REPLY COMMENTS OF EXCEL TELECOMMUNICATIONS, INC.**

Excel Telecommunications, Inc. ("Excel"), by its attorneys, respectfully submits these reply comments regarding the proposed conditions of SBC Communications, Inc. ("SBC") and Ameritech Corporation ("Ameritech") submitted to the Commission in connection with their pending application for transfer of control of Ameritech to SBC.<sup>1</sup> These reply comments do not address all the proposed conditions, nor do they address all the issues explored in the comments.<sup>2</sup> Rather, Excel focuses on those conditions that best illustrate that, although the FCC's goals in

<sup>1</sup> Public Notice, DA 99-1305, released on July 1, 1999, required oppositions or responses to the comments to be filed by July 20, 1999. By Order released July 7, 1999, DA 99-1342, the Commission extended the filing deadline for replies to July 26, 1999. These reply comments therefore are timely filed.

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crafting these conditions are commendable, several of the commitments are largely illusory and do not go far enough toward accomplishing the pro-competitive purposes of Section 251.

Excel is the fourth largest long distance carrier in the United States in terms of presubscribed lines, and it is one of the fastest growing providers of telecommunications services in North America. Through resale, and increasingly through the use of its own facilities, Excel serves primarily residential customers widely dispersed throughout the country. Excel is keenly interested in providing competitive local telecommunications services under the market-opening provisions of Section 251, which the conditions ostensibly are designed to fulfill.

Unfortunately, as many commenters agree, significant aspects of the SBC/Ameritech commitments are hollow – their volume cannot hide the fact that, in most instances, the proposed conditions are simply promises to live up to existing legal obligations. And even in those cases, the proposed conditions often represent only partial or temporary compliance with the law. Promises not to violate the law, or to partially comply with it, can not serve as the basis for a positive public interest finding in support of the merger.

## **I. THE UNE-RELATED CONDITIONS ARE TOO RESTRICTIVE**

The proposed conditions related to UNE combinations, resale discounts and unbundled loops are of particular importance to a company with a largely residential, geographically dispersed customer based, like Excel. Those conditions are substantially flawed by their limitations and short life-span.

UNE Combinations: SBC and Ameritech promise to make the UNE platform

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{...continued)

SBC and Ameritech submitted the proposed conditions in response to Chairman Kennard's April 1, 1999 letter explaining that the merger raises "serious concerns" with respect to promotion of the public interest.

available on a severely restricted basis to competitors serving only residential customers.<sup>3</sup> This is a promise to do *less than* the law already requires. By limiting the availability of UNEs in combined form, SBC and Ameritech ignore the FCC rules reinstated by the Supreme Court.<sup>4</sup> *AT&T Corp.* removes all doubt that Section 251(c)(3) entitles all requesting carriers to obtain and use UNEs in any technically-feasible combination.<sup>5</sup> Nothing in that decision allows SBC and Ameritech to restrict the ability of CLECs to purchase UNEs both as separate elements and in combination. The Court expressly held that ILECs may separate combinations of network elements only when desired by the requesting carrier.<sup>6</sup> Nonetheless, in their proposed conditions, SBC and Ameritech reserve the ability to break up combinations of elements for many services, and indeed for all services and customers after a constricted period of time. This is impermissible under the FCC's rules and *AT&T Corp.*<sup>7</sup> and should not be accepted as part of a positive public interest finding.

If SBC and Ameritech are permitted to (illegally) ration competitors' access to the UNE platform, broad-based competition will suffer. Indeed, the ability to combine network elements to provide service is essential to competition in both the residential and the business markets. The service, customer class and maximum line restrictions, in combination with the proposed time limitations, would prevent competitors from relying on the UNE platform option in any meaningful, reliable way. Even in the residential market, competitors will be forced to commit duplicative facilities and obtain UNE combinations through expensive and time-

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<sup>3</sup> SBC/Ameritech Proposed Conditions at 26-27.

<sup>4</sup> See *AT&T Corp. v. Iowa Utils. Board*, 119 S. Ct. 721 (1999) ("*AT&T Corp.*").

<sup>5</sup> 47 U.S.C. § 251(c)(3).

<sup>6</sup> *AT&T Corp.* at 736-38.

<sup>7</sup> See, e.g., CompTel Comments at 43.

consuming collocation methods. For many competitors, lack of access to the UNE platform will stand as a total bar to entry.

As Excel has recently advocated, the FCC should affirm its current list of mandatory UNEs, as well as the legal entitlement of all carriers to obtain and use any UNE combination to serve end-user customers.<sup>8</sup> Excel will be able to provide local services in a timely way to its entire customer base, residential and rural, only through ILEC-supplied UNE combinations – and it is ready and waiting to do so. However, if the Commission adopts the restrictive conditions on UNEs proposed by SBC and Ameritech, local competition for residential services will be put on hold indefinitely. Simply put, SBC and Ameritech cannot be permitted to rescind the legal entitlement of requesting carriers to obtain and use UNE combinations. And, they certainly should not be permitted to rely on such a proposal to partially comply with the law as support for a public interest finding in favor of their merger.

*“Maximum Allowable Quantities” for Resale Discounts and UNE Combinations:*

SBC and Ameritech propose the imposition of service and customer class restrictions on the availability of their so-called “promotional” UNE platform and resale discount offerings, again a commitment to do less than the law already requires.<sup>9</sup> Further, they impose time “windows” on both the discounts and the availability of the UNE platform so as to essentially give SBC and Ameritech the ability to dictate the method, scope and timing of their competitors’ entry into the market.<sup>10</sup> These restrictions and time windows on “promotional” UNE combinations and resale offerings will impede or possibly even foreclose the ability of competitors like Excel to provide

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<sup>8</sup> See Excel reply comments filed in response to the *Second Notice of Proposed Rulemaking* (FCC 99-70) in CC Docket No. 96-98.

<sup>9</sup> SBC/Ameritech Proposed Conditions at 24-26.

<sup>10</sup> See, e.g., MCI WorldCom Comments at 51-54; AT&T at 82-89.

broad-based local exchange service.

SBC and Ameritech limit the resale and UNE combination offerings in such a way as to preclude most competitors from taking advantage of them.<sup>11</sup> In other words, because of the short “window” of time permitted *and* the small number of lines available on a first come, first served basis, most carriers will be completely out of luck.<sup>12</sup> Specifically, the UNE platform and resale discount is limited to approximately 7.7% of SBC/Ameritech residential lines.<sup>13</sup> Moreover, the offering “window” will slam shut for *both* UNE combinations and resale after *either* UNE combinations *or* resale reaches the line limit.<sup>14</sup> Undoubtedly most of any available time would be consumed by marketing, engineering and provisioning by carriers like Excel, which has over a million customers in SBC-Ameritech territory. Excel might be left with little or no time to serve its customers – even assuming it can obtain the offerings before the thresholds are met and the “window” slams shut. In sum, the promotions are time-service-class-and-number-restricted to the point of becoming nugatory.

Sunset: SBC and Ameritech propose a three year sunset, not only on the UNE conditions, but on *all* of the conditions.<sup>15</sup> This unsupportable sunset, taken together with the fact that many conditions are not required to be satisfied for many months, and even years, after consummation of the merger, would result in a potential meaningless period of compliance, or in many cases, no compliance whatsoever. Given the fact that several conditions promise less than what is already required by law, the sunset is likewise far less than the law requires and certainly

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<sup>11</sup> SBC/Ameritech Proposed Conditions at 25-27.

<sup>12</sup> See, e.g., AT&T Comments at 83; MCI WorldCom Comments at 52.

<sup>13</sup> AT&T Comments at 89.

<sup>14</sup> SBC/Ameritech Proposed Conditions at 27.

<sup>15</sup> SBC/Ameritech Proposed Conditions at 36.

no basis for a public interest finding. Excel agrees that any condition must remain in place for as long as necessary to serve its intended purpose of providing full and fair opportunities for the viable establishment of broad-based local competition.<sup>16</sup>

Pricing Rules and Shared Transport: Again, these two conditions<sup>17</sup> are meaningless because SBC and Ameritech are required to comply with the Commission's pricing rules, as well as offer shared transport.<sup>18</sup> It is a truism that SBC and Ameritech are required to comply with the Commission's rules and that conditions that require the same are no basis for finding a merger to be in the public interest.

## **II. THE PROPOSED SEPARATE ADVANCED SERVICES AND CLEC AFFILIATE STRUCTURE IS INADEQUATE**

SBC and Ameritech propose that they be allowed to provide advanced services and CLEC services through affiliates in a way that permits substantial joint activity, intermingling and cross-subsidization.<sup>19</sup> These proposed structural separation requirements clearly do not adequately constrain SBC/Ameritech's ability to discriminate in favor of its own affiliates. In other words, Commission acceptance of the proposal would give SBC and Ameritech a hook to hang its refusal to comply with Section 251's unbundling, resale and non-discrimination obligations.<sup>20</sup> Any SBC/Ameritech advanced services affiliates must not be permitted to avoid classification as ILECs under Section 251(c). Other commenters concur with

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<sup>16</sup> See, e.g., MCI WorldCom Comments at 9-10.

<sup>17</sup> SBC/Ameritech Proposed Conditions at 22-23.

<sup>18</sup> See, e.g., MCI WorldCom Comments at 46, 49-51; AT&T Comments at 73-74, 78-82. Although Rule 319 was vacated, the ILECs have committed to continue to provide the previously mandated list of UNEs pending the outcome of the UNE Remand proceeding.

<sup>19</sup> SBC/Ameritech Proposed Conditions at 14-22.

Excel that any affiliate is necessarily subject to the Act's unbundling and resale requirements as a "successor" or "assign" of the ILEC, and as a comparable carrier pursuant to Section 251(h).<sup>21</sup>

Although the structural separation requirements outlined by SBC and Ameritech are purportedly drawn from Section 272, they are, in fact, weaker and inadequate. Excel encourages the Commission to require the imposition of additional structural safeguards in order to disallow, for example, joint marketing, space sharing, customer transfers, use of brand name and equipment transfers.<sup>22</sup>

### **III. THE OSS PROPOSALS, MFN CONDITION AND PERFORMANCE INCENTIVE PLAN ARE COMMENDABLE IN CONCEPT BUT INSUFFICIENT AND FLAWED IN THEIR DETAILS**

OSS: Uniform OSS is an important step forward, but the instant proposal falls short of the mark.<sup>23</sup> Indeed, the availability of uniform and efficiently functioning OSS are fundamental prerequisites to the usefulness of nearly all of the proposed conditions. However, because of the phase-in structure of the OSS requirements as proposed, they will likely sunset before compliance.<sup>24</sup> Thus, Excel supports the suggestion of CompTel that the FCC should require not only implementation of uniform OSS throughout the merged entity's region (in a timely manner), but also the adoption of the OSS required in Texas as the uniform OSS, which is the system using the most recently developed standards. This way, CLECs will be able to deploy

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(...continued)

<sup>20</sup> See, e.g., Cable & Wireless USA Comments at 8; AT&T Comments at 56-61; MCI WorldCom Comments at 40-41.

<sup>21</sup> See, e.g., MCI WorldCom Comments at 41.

<sup>22</sup> See, e.g., CompTel Comments at 24-27; MCI WorldCom Comments at 43; AT&T Comments at 61-70.

<sup>23</sup> SBC/Ameritech Proposed Conditions at 4-12.

<sup>24</sup> See, e.g., MCI WorldCom Comments at 28; AT&T Comments at 35-39 (in essence "paper promises to negotiate" with CLECs).

interfaces compatible with SBC/Ameritech.<sup>25</sup>

MFN Arrangements: At first glance, the proposed commitment to offer CLECs MFN for interconnection provisions obtained from ILECs for SBC/Ameritech's out-of-region CLEC operations appears beneficial.<sup>26</sup> However, it is too restricted in that it is limited to agreements and UNEs never before made available to any other CLEC and only those obtained through arbitration.<sup>27</sup> Similarly, pick and choose for in-region agreements applies only for provisions in voluntarily negotiated agreements. Because many key pro-competitive provisions are derived from arbitrations, this restriction is significant. Moreover, it is contrary to obligations upheld by the *AT&T Corp.* decision.<sup>28</sup> Again, this promise is purely cosmetic and should not be accepted by the Commission as the basis for a public interest finding.

Performance Incentive Plan: To be sure, the adoption of performance measures and remedies is important. However, in order to be effective, the performance standards must be designed to ensure SBC/Ameritech compliance with the 1996 Act. Unfortunately, the plan proposed here is entirely too incomplete and inadequate.<sup>29</sup> For example, many critical performance criteria omitted from the measurements plan. Thus, the plan should be revised to ensure the effectiveness and enforceability of this provision.

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<sup>25</sup> See CompTel Comments at 33-34.

<sup>26</sup> SBC/Ameritech Proposed Conditions at 28.

<sup>27</sup> See *id.* at 36-38.

<sup>28</sup> See, e.g., AT&T Comments at 93-96.

<sup>29</sup> See, e.g., MCI WorldCom Comments at 11-25; AT&T Comments at 1-27.



#### **IV. THE COMMISSION MUST ENSURE THAT ADOPTION OF ANY CONDITION DOES NOT PREJUDGE THE OUTCOME OF OTHER FCC RULEMAKING PROCEEDINGS**

Excel joins other commenters in concern about the possible impact of the adoption of these conditions for SBC and Ameritech on other FCC proceedings (for example, the UNE Remand Proceeding; future Section 271 proceedings; the Section 706 advanced services proceeding; and the CompTel Section 251(h) declaratory rulemaking petition) in terms of regulatory policy and the general rulemaking process.<sup>30</sup> That is, adoption of these conditions may unintentionally compromise other proceedings or cause the Commission to prejudge issues to be decided elsewhere. At a minimum, therefore, the FCC should confirm that these conditions do not substitute for SBC/Ameritech's obligations under the Act and do not affect the agency's capacity to adopt the same or additional requirements in general rulemaking proceedings.<sup>31</sup>

With respect to the UNE conditions, for example, the Commission must ensure that its task in the UNE Remand proceeding is not clouded or affected in any way by this decision. An (unintended) shift in policy here could hinder the future development of competition throughout the country as a result of restrictions on UNE combinations.<sup>32</sup> Excel urges the Commission to require SBC and Ameritech to provide unrestricted access to the UNE platform in accordance with the Commission's existing rules. Additionally, the structural separation requirements for CLEC and advanced services affiliates, if adopted, may taint other pending proceedings.<sup>33</sup> The FCC must affirmatively guard against this possibility.

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<sup>30</sup> See, e.g., CompTel Comments at 5.

<sup>31</sup> See Cable & Wireless USA Comments at 5.

<sup>32</sup> See *id.* at 7.

<sup>33</sup> See MCI WorldCom Comments at 41.

## **CONCLUSION**

As shown above, many of the SBC/Ameritech proposed conditions are mere promises to observe these companies' already existing legal obligations. Moreover, they often represent only partial or temporary compliance with the law, or indeed in some cases are contrary to existing law and regulation. The Commission should make clear that commitments that do nothing more than recite existing obligations or limit those obligations cannot be the basis for a positive public interest finding in support of the SBC/Ameritech merger.

Respectfully submitted,

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July 26, 1999

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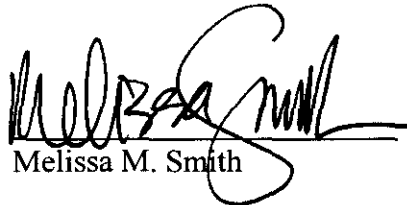
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